



The University of the State of New York

The State Education Department State Review Officer

No. 07-099

Application of a CHILD WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Lakeland Central School District

Appearances:

Shaw, Perelson, May & Lambert, attorney for respondent, Garrett L. Silveira, Esq., of counsel

DECISION

Petitioners appeal from a decision of an impartial hearing officer which determined that the educational programs respondent's Committee on Special Education (CSE) had recommended for their daughter for the 2005-06 and 2006-07 school years were appropriate. The appeal must be dismissed.

At the commencement of the impartial hearing in March 2007, the student was attending respondent's middle school, and her eligibility for special education and related services as a student with multiple disabilities is not in dispute (Parent Ex. L; see 8 NYCRR 200.1[zz][8]).

The student attended nursery school at a Board of Cooperative Education (BOCES) preschool for special needs when she was four years old (Dist. Ex. 3 at p. 4). She attended kindergarten for two years; first in a self-contained special education class and then in a collaborative class (id.).

From second grade through fifth grade, the student attended one of respondent's elementary schools where, for all four years, the student was instructed by the same special education teacher and received the services of the same 1:1 aide (Tr. pp. 263, 654). During this period, the student was instructed by different regular education teachers each year (Tr. pp. 263-64, 654).

The student's mother testified that during the student's elementary school years the student had "full access" to regular education schoolwork and peers, sometimes with

modifications (Tr. pp. 654, 656). Instruction occurred in a co-teaching model consisting of a combination of full class instruction with regular education and special education students and pull-out instruction with a mix of regular and special education students (Tr. pp. 283-84, 654-55). Since the student entered school, she participated in the alternative assessment rather than taking regular state and local assessments (Tr. pp. 655, 658). Socially, the student's mother stated that the student had play dates and attended sleepovers and parties with both regular education and special education students from her classes (Tr. p. 660).

On June 6, 2005, a subcommittee of respondent's CSE met for the student's annual review and to plan for the student's 2005-06 school year at respondent's middle school (Parent Ex. E at p. 1). Attendees at the June 2005 CSE meeting were petitioners, the CSE chairperson, the student's special education teacher and regular education teacher, the speech-language pathologist, the occupational therapist, the social worker, and an occupational therapy (OT) intern (id. at p. 5). The June 2005 CSE recommended that the student be placed in a basic/life skills program consisting of a special class program (12:1:1) with related services of speech-language (5:1) two times per week for 30 minutes, OT (5:1) one time per week for 30 minutes, quarterly physical therapy indirect consultation, and continuation of a 1:1 aide for six hours per day, five times per week (id. at pp. 1-2, 5; see Parent Ex. A at p. 8). The June 2005 CSE also recommended that the student receive extended school year services (ESY) and transportation on a small bus (Parent Ex. E at p. 1). The following program modifications and accommodations were listed on the student's June 2005 individualized education program (IEP): check work in progress; concrete examples provided; cue expected behaviors; and refocus and redirect (id. at p. 2). The June 2005 IEP also indicated that the student would have access to a word processor (id.). Extended time (1.5) and location with minimal distractions were listed as testing accommodations on the June 2005 IEP (id.).

The June 2005 CSE determined that the student would not participate in state and local assessments because her severe disabilities required the use of alternate performance indicators to appropriately assess her abilities and needs (Parent Ex. E at p. 2). With regard to the student's participation in general education programs, the June 2005 IEP indicated that the student would not participate in regular education for "all academic areas," that she would participate in adaptive physical education and that she was excused from the foreign language requirement (id. at p. 3). The June 2005 IEP contained numerous goals pertaining to the areas of study skills, reading, writing, mathematics, speech/language, social/emotional/behavioral, and motor skills (id. at pp. 5-8). The June 2005 CSE Chairperson reported that, at the time the June 2005 IEP was developed, petitioners were in agreement with the CSE's recommendations (Tr. p. 445).

In a letter to the middle school supervisor for special education (special education supervisor) dated January 13, 2006, petitioners indicated that the student was doing well and that they were happy with her transition to the middle school (Parent Ex. B at p. 1). Petitioners also indicated their concern that the student was missing out on opportunities that assisted her in learning and modeling behavior of peers, and they requested more opportunities for their daughter to work with the regular education population (id. at p. 2).

In February 2006, the student participated in a sewing project conducted in a regular education home and careers class (Tr. pp. 450, 512). Between February and March 2006, the special education supervisor conferred with the middle school principal, psychologist, and social

workers who worked with students on social skills, regarding opportunities for the student to mix with other students to further develop her social skills and to enhance her ability to communicate (Tr. pp. 450-52). During the 2005-06 school year, the special education supervisor indicated that all of the students in the life/basic skills programs had been integrated with regular education students during lunch and chorus (Tr. p. 453).

On June 7, 2006, a subcommittee of the CSE met for the student's annual review and to plan for the student's 2006-07 school year (Parent Ex. F at p. 1). Among those in attendance at the June 2006 CSE meeting were the CSE Chairperson, petitioners, the student's fifth and sixth grade special education teachers, her speech teacher, her occupational therapist, her physical therapist and a regular education teacher (id. at p. 5). The CSE meeting minutes set forth in the June 2006 IEP showed that petitioners were concerned that the student's transition to middle school could have been accomplished more quickly had the middle school team consulted with the student's prior elementary school team (id.). In addition, the June 2006 IEP indicated that petitioners believed that the student's transition to middle school was inhibited by deficiencies in both the access to grade level curriculum and actual content delivery, even with the benefit of a very restrictive life skills program (id. at pp. 5-6). According to the June 2006 CSE meeting minutes, petitioners believed that placement in the basic skills program was not in the best interests of the student because the student considered the work too easy and her teachers did not understand the extent of her knowledge and skills (id. at p. 6). The minutes indicated that petitioners discussed "raising the bar" for the student through a more rigorous program aligned to state standards without focusing on the alternative standards (id.). At the June 2006 CSE meeting, the student's teachers indicated that the generalization to real-life applications of skills was necessary for the student to succeed (id.). According to the student's teachers and related service providers, she exhibited progress in speech-language therapy, OT, and in classroom participation with modifications to the general education curriculum (id.).

For the student's seventh grade school year, the June 2006 CSE recommended that she receive 15:1:1 special class instruction for English, math, science, social studies, and skills five times per week for 39 minutes (Parent Ex. F at pp. 1-2). The June 2006 CSE also recommended, among other things, that the student's speech-language therapy, OT and use of a 1:1 aide all continue at established frequencies and durations (id.). The June 2006 CSE recommended ESY services, with the student placed in a sixth grade 15:1:1 program for the purposes of reviewing skills presented during sixth grade and preventing substantial regression (id. at p. 6).

The June 2006 IEP indicated that particular focus would be placed on exposure and access to participation with non-disabled students (Parent Ex. F at p. 6). The June 2006 IEP also listed the following program modifications, accommodations and supplementary aids and services: check work in progress; concrete examples provided; cue expected behaviors; refocus and redirect; access to word processor; additional time to complete tasks; check for understanding of assignments; cue student to key points (overhead, underline); have student restate information; multi-sensory approach; and wait time when answering questions (id. at pp. 2-3). Testing accommodations set forth in the June 2006 IEP included extended time (2.0), a testing location with minimal distractions, answers recorded on the student's behalf on bubble sheets, questions and passages read to the student, revised or simplified language in directions, and provision of a scribe (id. at p. 3).

For the 2006-07 school year, the CSE recommended that the student participate in the same state or local assessments that are administered to general education students (Parent Ex. F at p. 3). The June 2006 CSE recommended that the student continue to receive adapted physical education and be exempt from the foreign language requirement (id.). Annual goals addressed study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, motor, and basic cognitive/daily living skills (id. at pp. 7-11). The June 2006 IEP indicated that petitioners were disappointed with the student's placement for 2005-06; however, petitioners agreed with the June 2006 CSE's recommendations for the 2006-07 school year (id. at p. 6).

On August 9, 2006, a subcommittee of the CSE met for a special review to discuss discrepancies noted by the student's parent with regard to the student's levels and abilities across the academic, social, physical and management domains (Parent Ex. L at pp. 5-6). Petitioners requested an independent educational evaluation (IEE) at respondent's expense (id.). The August 2006 CSE concurred and recommended an independent neuropsychological evaluation that assessed the student's memory skills and evaluated her strengths and weaknesses relative to the learning process (id.). The August 2006 CSE also recommended that the student's triennial reevaluation be completed in September 2006 for comparison with the scores obtained by the independent neuropsychologist (id.). The parties agreed that respondent's evaluators would only receive the list of tests administered by the neuropsychologist and would not review the results of the neuropsychological evaluation until after conducting the triennial reevaluations (Tr. p. 628).

A neuropsychological evaluation report dated August 21, 2006 indicated that the student was cooperative, polite and motivated during the evaluation (Dist. Ex. 3 at pp. 2, 6). Administration of the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV) yielded a full scale IQ score of 60, placing the student in the 0.4 percentile (id. at p. 12). The evaluation report indicated that a consistent pattern of results was obtained for the student's overall cognitive functions, as indicated by all of her index scores being in the borderline to impaired range on the WISC-IV (id. at pp. 12, 16-22). Results of additional testing of the student's visual memory through administration of the Wide Range Assessment of Memory and Learning (WRAML) ranged from borderline to average, with the student's best result in visual recognition (id. at pp. 7, 12). Administration of the Wide Range Achievement Test - 3 (WRAT-3) yielded academic achievement scores that were below grade level, and consistent with her impaired or borderline cognitive and memory abilities (id. at p. 12). Arithmetic, spelling and reading achievement scores had improved from the time she was previously tested in 2001 (id.). Overall, the neuropsychologist's findings indicated that, based on evidence from objective, quantitative, and standardized tests, the student had an impaired intellectual level of functioning that was consistent with results from previous testing and with her current delayed academic achievement (id. at p. 13). The neuropsychologist recommended that the student be given structured classroom instruction with a small class size, concrete instruction, multiple approaches to presentation of material, OT, speech-language therapy, and monitoring of the student in order for her to avoid dangerous physical and social situations due to the student's poor understanding of her environment (id.). The neuropsychologist also recommended supportive psychotherapy or behavioral techniques if the student became frustrated with her progress, counseling for petitioners, and coordination among various service providers and her school (id.).

An undated progress report on the student's annual goals and objectives for the 2005-06 school year indicated that the student achieved all of her annual goals and short term objectives in the areas of reading and writing, and social/emotional/behavioral (Tr. p. 739; Dist. Ex. 8 at pp. 9-10). According to the report, the student was "progressing satisfactorily" in her goals and objectives for the areas of study skills and math (Dist. Ex. 8 at pp. 9, 11), and she achieved a few short term objectives in the area of speech-language and the motor area, while she was progressing satisfactorily in other objectives within the same domains (id. at pp. 11-13). The student's report card issued for the period ending August 29, 2006 indicated that the student received grades in the 70's, 80's, and 90's for all of her courses throughout the 2005-06 school year (id. at p. 5).

On October 18, 2006, respondent conducted a speech-language evaluation (Dist. Ex. 7 at p. 1). A November 16, 2006 speech-language evaluation report indicated that administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) yielded a Core Language standard score (SS) (and percentile rank) of 48 (< 0.1), placing the student in the very low range of functioning (id. at p. 6). Specific index standard scores were: Receptive Language Index SS 62 (1st); Expressive Language Index SS 49 (< 0.1); Language Content Index SS 68 (2nd); and Language Memory Index SS 45 (< 0.1); and these scores placed the student in the very low range of functioning (id. at pp. 6-7, 9). Administration of the Receptive One-Word Picture Vocabulary Test (ROWPVT) yielded a SS (and percentile rank) of 79 (9th), with an age equivalent of 9-1 (id. at p. 9). Administration of the Expressive One-Word Picture Vocabulary Test (EOWPVT) yielded a SS (and percentile rank) of 80 (9th), with an age equivalent of 9-5 (id.). Behaviorally, the student was described as attentive and "on task" during the evaluation process that took place over the course of three separate class periods (id.). The student reportedly did not initiate conversation with the evaluator and eye contact was inconsistent (id.). When asked to provide personal information, the student was able to recite her address with some prompting, but she did not know the state in which she lives or the year she was born (id.). In addition, the evaluation report noted that, during the evaluation, the student was reluctant to let the examiner know when she did not know the answer to something, and she would instead look down and play with her sleeve, despite reassurance that she was not expected to answer everything correctly (id.). The evaluator recommended that the student continue receiving speech-language therapy two times per week in a group so that she could focus on improving receptive, expressive, and pragmatic language skills (id.).

On October 23, 2006, respondent's occupational therapist conducted an OT evaluation (Dist. Ex. 6 at p. 1). The occupational therapist indicated that at the time of the evaluation the student participated in an OT program one time per week, with therapy focusing on improving the student's visual and fine motor skills related to classroom skills such as writing and typing (id.). The student's behavior during the OT evaluation was described as pleasant and cooperative (id.). The student appeared to give her best effort throughout testing, and, according to the evaluator, she demonstrated attentiveness and was able to transition from one task to another without difficulty (id.). Administration of the Bruininks-Oseretsky Test of Motor Proficiency - Second edition (BOT-2) yielded a SS (and percentile rank) of 27 (1st) for Fine Manual Control and a SS of 32 (4th) for Manual Coordination (id.). Overall, the occupational therapist indicated that the student was performing fine manual control and manual coordination below the average for her same-aged peers (id. at p. 3). According to the evaluation report, the student exhibited difficulty with letter formation and handwriting, as well as motor planning with novel motor

tasks (id.). During timed tasks, the student's performance appeared to be limited due to decreased processing speed (id.). The occupational therapist recommended that the student continue to participate in her OT program to address coordination issues that may affect her classroom performance (id.).

Respondent conducted an educational evaluation of the student on October 30, 2006 and November 2, 2006 (Dist. Ex. 5 at p. 1). A November 16, 2006 educational evaluation report indicated that the student presented as quiet, and came to all testing sessions without difficulty (id.). When the student was asked questions about herself, she spoke very softly and she answered them without hesitation; although, according to the evaluation report, she appeared at times to have difficulty retrieving the appropriate words (id.). The student was further described in the evaluation report as cooperative, but at times she appeared to be a bit distracted and played with either her pencil or the zipper on her sweatshirt (id.). In addition, the evaluator described the student as very polite and willing to try everything, and noted that the student was tentative when she was not sure of an answer (id.). Despite the length of the evaluation, the student reportedly remained motivated (id.). The evaluator opined that the results of the evaluation showed an adequate estimation of the student's abilities (id.).

Administration of the Wechsler Individual Achievement Test - Second Edition (WIAT – II) yielded a Reading Composite SS (and percentile rank) of 52 (0.1), a Math Composite SS of 46 (< 0.1), and a Written Language Composite SS of 63 (1st) (Dist. Ex. 5 at pp. 1-2, 4). On the Listening Comprehension subtest of the WIAT-II, the student achieved a SS of 61 (0.5) (id. at pp. 2, 4). The evaluation report indicated that the student's performance on the WIAT-II was in the severely low range (id. at p. 3). According to the evaluator, the student's weak performance in the areas of reading, writing, and especially mathematics suggested deficits on the basic skills level (id.). The student was noted to have difficulty when decoding words, comprehending reading passages, expressing ideas and writing, spelling, listening comprehension, and engaging in the calculations of numbers as well as math problems (id.).

Over four sessions between November 6, 2006 and November 13, 2006, respondent's school psychologist conducted a psychological evaluation (Dist. Ex. 4 at p. 1). The psychological evaluation report, dated November 17, 2006, indicated that the student presented as cooperative, motivated, polite, quiet and initially shy, but she did become more animated when telling the examiner about her weekend activities and interests (id. at pp. 1-2, 7). The psychologist noted that the student spoke clearly when answering questions about her interests and when she was confident in her ability to correctly respond to test items (id. at p. 2). At times during testing, the student spoke in a soft voice that was inaudible to the psychologist, requiring her to repeat her responses for the psychologist (id.). The student responded quickly when she knew an answer (id.). According to the psychologist, when the student seemed unsure of herself and did not know an answer, the student tended not to respond and played with her clothing or tapped her fingers on the table and thus required prompting (id.). In addition, the evaluation report noted that the student's attention appeared to waver on occasion, particularly when she was required to attend to a specific task or item for a length of time (id.). The psychologist indicated that the student worked most confidently on visual processing and phonological tests, and appeared to have more difficulty with language based tasks and tasks that involved multiple processing abilities, abstract thinking and problem-solving (id.). The psychologist opined that

the results of the psychological evaluation were a valid and reliable measure of the student's cognitive functioning at that time (id.).

The psychologist's administration of the Woodcock Johnson Tests of Cognitive Ability-III (WJ-III) yielded a General Intellectual Ability SS (and percentile rank) of 42 (< 0.1), which is in the Very Low Range (Dist. Ex. 4 at p. 2), and suggested the student's preference for learning was in the visual modality, with strength in visual-spatial thinking ability (id. at p. 6). The student demonstrated weaknesses in verbal comprehension and reasoning, long term retrieval and associative memory, short term and working memory, fluid reasoning and processing speed (id.). The student appeared most successful when provided with visuals and when information was provided in a straightforward manner (id.). Administration of the Test of Auditory Processing Skills - 3, a test that measures a student's auditory attention, phonemic skills, auditory memory and auditory processing abilities, yielded an overall SS of 79 (8th), which is in the Borderline Range (id. at p. 5). Specific index standard scores were: Phonologic Index SS 90 (25th); Memory Index SS 74 (4th); and Cohesion Index SS 73 (4th) (id. at p. 9).

The psychologist recommended that, among other things, the student would benefit from the breaking down of information, presenting information in limited amounts and checking for her understanding, and repeating and reviewing concepts and directions (Dist. Ex. 4 at p. 6). The psychologist also recommended providing visual supports and modeling to help the student to understand tasks and concepts more efficiently, breaking multi-step processes down into manageable units, refocusing and redirection to ensure that the student was attending to tasks, extending time for tests and quizzes, and giving encouragement and positive feedback (id. at p. 7).

On November 27, 2006 a subcommittee of the CSE convened to review the student's evaluations (Parent Ex. L at p. 6). A revised November 2006 IEP for the student's 2006-07 school year noted that the student's overall evaluation scores indicated that she continued to present with an overall profile in the impaired range, with areas of relative strength in visual and concrete auditory tasks (id.). The classroom teacher reported that the student greatly benefited from the support of her 1:1 aide (id.). The November 2006 IEP comments further described the student as volunteering, participating in all classroom activities and beginning to ask questions of the teacher if the aide was absent (id.). Petitioners reported that the student was enthusiastic about school and diligent in completing all homework with assistance (id.). As social opportunities outside of school increased, respondent's staff noted an increase in the student's verbal interactions during structured activities and that the student was more independent in activities of daily living (id.).

The November 2006 IEP indicated that the student benefited from repeating and reviewing information, chunking of information, and connecting new information to previously learned material (Parent Ex. L at p. 6). At the November 2006 CSE, the occupational therapist indicated that the student displayed good improvement in her continued development of keyboarding skills (id.). With respect to testing accommodations, the November 2006 CSE recommended that the student's 2006-07 IEP be revised to include, among other things, using a calculator to check work in progress and providing graph paper (id. at pp. 3, 6).

In a due process complaint notice dated March 5, 2007, petitioners alleged that the student was denied a free appropriate public education (FAPE)¹ for the 2005-06 and 2006-07 school years because she was placed in the "most restrictive environment" and that respondent failed to comply with the student's IEPs (Parent Ex. K at p. 2). Among other things, petitioners alleged that the student was not given access to math textbooks, a linkage to the general education curriculum, or her general education peers (*id.* at pp. 2-3). Petitioners further alleged that the student regressed in the areas of math and language/communication skills, and had self-esteem issues (*id.* at p. 3). Petitioners also alleged that respondent engaged in illegal actions and gross errors in management of public education (*id.*). Among other things, petitioners sought changes to differentiation in the student's instruction during the school day, additional staff development, a determination of the extent of harm to the student, a determination that respondent violated the student's or petitioners' civil rights, an injunction preventing respondent from engaging in discriminatory conduct, compensatory education, and compensatory and punitive damages (Parent Ex. K at p. 4; IHO Ex. 1 at p. 21)

Prior to the impartial hearing, respondent moved to limit the impartial hearing with regard to certain aspects of petitioners' due process complaint notice before the impartial hearing officer (IHO Ex. 1 at pp. 4-5, 8). On April 19, 2007, the parties and the impartial hearing officer participated in a telephonic prehearing conference (IHO Ex. 1). The impartial hearing officer reviewed the due process complaint notice and determined that he could not determine petitioners' civil rights, discrimination, compensatory education and damages claims (*id.* at pp. 23, 25-27, 32-34). The impartial hearing officer and the parties also reduced the number of witnesses that petitioners requested that respondent produce for testimony (*id.* at pp. 43, 48).

The impartial hearing commenced on May 10, 2007 and concluded on May 31, 2007, after four days of testimony. In a decision dated July 12, 2007, the impartial hearing officer found that petitioners failed to meet their burden to establish that the student's programs for either the 2005-06 or 2006-07 school years were inappropriate (IHO Decision at pp. 1, 4). The impartial hearing officer noted that the educators who knew and worked with the student testified that the student was appropriately placed in the life skills program for the 2005-06 school year and that the student received educational benefits while placed in the program (*id.* at p. 11). The impartial hearing officer also relied upon petitioners' January 2006 assertion that the student was doing well and that they were pleased with her transition into middle school (*id.* at p. 12). With respect to the 2006-07 school year, he determined that the student had an "educationally successful" year; that, according to her teachers, the student improved both academically and socially; and that the teacher's observations were confirmed by the student's grades and goal reports (*id.* at p. 13).

¹ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

Petitioners appeal, contending that the impartial hearing officer erred by ruling in the prehearing conference that petitioners were not entitled to a combined hearing pursuant to both the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.*) and Section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[1]), thus precluding the admission of relevant evidence. Petitioners argue that the impartial hearing officer did not reach the correct conclusions in his decision and that the student should be awarded one year of compensatory education because he failed to consider several assertions and documents contained in the hearing record. Petitioners also assert that the impartial hearing officer failed to act independently when he adopted the reasoning and citations set forth in respondent's post-hearing memorandum of law.

In its answer, respondent argues that the petition should be dismissed because it does not contain numbered paragraphs.² Respondent also contends that petitioners have failed to state a claim for compensatory education and that their appeal is moot because the student has completed the 2005-06 and 2006-07 school years. Respondent urges affirmance of the impartial hearing officer's decision that the student was not denied a FAPE for either school year.

The central purpose of the IDEA (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; *see Schaffer v. Weast*, 546 U.S. 49, 51 [2005]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-81, 200-01 [1982]; *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d];³ *see* 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (*Rowley*, 458 U.S. at 206-07; *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (*Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 [2d Cir. 2003]; *Perricelli v. Carmel Cent. Sch. Dist.*, 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34

² Although respondent correctly points out that petitioners failed to number the allegations in their petition for review (*see* 8 NYCRR 279.8[3]), it would not be administratively efficient, under the circumstances presented here, to dismiss the petition solely on this ground. Accordingly, I will address the merits of petitioners' appeal.

³ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the IDEA, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. For convenience, citations in this decision refer to the regulations as amended because the regulations have been reorganized and renumbered.

C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see Walczak, 142 F.3d at 132). The LRE is defined as "one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled" (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 535 [3d Cir. 1995]). In determining an appropriate placement in the LRE, the IDEA requires that children with disabilities be educated to the maximum extent appropriate with children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see also Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; see 34 C.F.R. § 300.116). Further, both state and federal regulations require that when considering a placement in the LRE, school districts place the student as close to his or her home as possible, unless the IEP requires some other arrangement (34 C.F.R. § 300.116[b][3],[c]; 8 NYCRR 200.4[d][4][ii][b]). Consideration is also given to any potential harmful effect on the student or on the quality of services that he or she needs (34 C.F.R. § 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and state regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of children with disabilities for special education and related services (34 C.F.R. § 300.115; 8 NYCRR 200.6). The continuum of alternative

placement includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 C.F.R. § 300.115[b]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

At the outset, a procedural matter must be addressed. Petitioners have annexed to their petition several documents and a portion of a transcript from petitioners' section 504 hearing. Respondent objects to consideration of these documents. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, several of the documents submitted by petitioners with their petition for review are duplicative of documents already contained in the hearing record, and I decline to accept them on that basis. The remaining documents, some of which were available at the time of the impartial hearing and some of which were not, are not necessary in order for me to render a decision, and, therefore, I will not accept them (Application of a Child with a Disability, Appeal No. 07-049; Application of a Child Suspected of Having a Disability, Appeal No. 07-042).

Turning next to petitioners' argument that the impartial hearing officer should have heard all of petitioners' claims in a consolidated IDEA/section 504 hearing, I note that school districts are required to have certain policies and practices in place to implement the provisions of section 504, and to provide the opportunity for an impartial hearing and a review procedure (see 34 C.F.R. § 104.36). However, that review procedure does not include state-level review by a State Review Officer, whose jurisdiction is limited to matters arising under the IDEA and Article 89 of the Education Law (Application of a Child Suspected of Having a Disability, Appeal No. 03-094; Application of a Child with a Disability, Appeal No. 97-80). While a school district may elect to satisfy the impartial hearing requirements of section 504 by providing a hearing that conforms to the more stringent impartial hearing provisions under the IDEA, neither the IDEA nor Article 89 of the Education Law contain a provision mandating school districts to provide parents with consolidated IDEA/section 504 impartial hearings. With regard to petitioners' allegation that the impartial hearing officer failed to admit relevant evidence at the impartial

hearing, petitioners have not identified any facts or specific acts that were both relevant to one of their IDEA claims and which were actually precluded from evidence. Having searched the hearing record and finding no such error on the part of the impartial hearing officer, I conclude that petitioners' argument is without merit.

With regard to petitioners' claim that respondent failed to offer an appropriate program for the 2005-06 school year, I find that the June 2005 CSE developed an IEP that accurately described the student's present levels of performance and individual needs. I note that the June 2005 CSE considered the results of standardized tests conducted between December 2003 and April 2004 (Parent Ex. E at pp. 3-4), and formal testing administered during this time span addressed the student's cognitive, speech-language and motor abilities (id.). Testing results ranged between the fourth percentile and < 0.1 percentile (id.).

The student's academic needs were identified in the June 2005 IEP, including close monitoring in all tasks and with all transitions, as well as a multi-sensory approach to learning, and the use of strategies for auditory memory/processing, word finding skills, and expressive language output (Parent Ex. E at p. 3). Her social needs included positive guidance, modeling, and support from adults in social situations, as well as for the student to develop independent problem solving skills, and communication skills to cope with frustrations with tasks in an appropriate manner (id. at p. 4). Regarding the student's management needs, she required constant supervision by her 1:1 aide in order to maintain focus, transition from/to activities, and ensure her safety (id.). The June 2005 IEP consistently noted the student's need for close or constant monitoring by the 1:1 aide in all need areas (id. at pp. 3-4). The June 2005 IEP also included goals and objectives that addressed the student's needs within the areas of study skills, reading, writing, mathematics, speech/language, social/emotional/behavioral, and motor areas (id. at pp. 5-8).

I also find that the June 2005 CSE recommended an appropriate placement in a 12:1:1 special class program with related services of speech-language, OT, a full-time 1:1 aide and ESY services (Parent Ex. E at pp. 1-2). To further address the student's identified needs, the June 2005 CSE recommended program modifications, accommodations and supplementary aids and services that provided the student with the appropriate supports and requiring respondent's staff to check her work in progress, provide concrete examples, cue expected behaviors, and refocus and redirect the student (id. at p. 2). The June 2005 IEP also provided for access to a word processor and appropriate testing accommodations (id.). Upon considering the student's speech-language deficits, the June 2005 CSE appropriately exempted her from the foreign language requirement (id. at p. 3).

Turning to petitioners' assertion that the student was not given access to classes with regular education students, the hearing record shows the student's June 2005 IEP indicated that the student would not attend regular education for "all academic areas" (Parent Ex. E at p. 3), which I find was consistent with the student's needs discussed previously. Furthermore, testimony was elicited from one of the student's special education teachers indicating that the student's sixth grade 12:1:1 life skills program was academically-based and also addressed functional life skills, with an emphasis on fostering independence (Tr. p. 19). However, I note that the June 2005 IEP was unclear regarding whether the student would attend self-contained classes for specials such as music, art, computer, and home and careers. This lack of specificity

on the June 2005 IEP, however, was a procedural error that did not rise to a level of denial of a FAPE because, upon implementation of the June 2005 IEP, the student was actually provided with opportunities for integration with regular education students. The student had access to the regular education population through her adapted physical education class, which was combined with a regular education physical education class (Tr. pp. 106-07). By agreement, the adapted physical education teacher and the regular physical education teacher identified regular physical education activities that would be appropriate for the special education students (*id.*). In addition, the student's "team time" and music class occurred within the regular education environment (Tr. p. 22), and the student was integrated for lunch and chorus (Tr. p. 453). I also note that when petitioners became concerned with the student's opportunities for integration, they did not request that the CSE reconvene to modify the student's placement (Tr. p. 545). Instead, the hearing record shows that petitioners wrote a memorandum to respondent in January 2006, indicating they were pleased with the student's transition to middle school and provided their observations that additional opportunities for integration could be developed (Parent Ex. B at pp. 2-4). The memorandum also explained that petitioners recognized that the student's academic skill level would not permit her to join the regular education classes for many of her subjects (*id.* at p. 2). The middle school principal testified that, in February 2006, respondent nevertheless made efforts, without uprooting the students from their established schedules, to provide the student's life skills class with an opportunity for social skills integration with other regular education and special education students, and that the student was offered participation in a sewing project in an integrated home and careers class (Tr. pp. 510, 512).

Based on the forgoing, I concur with the impartial hearing officer's conclusion that petitioners did not meet their burden to establish that respondent denied the student a FAPE for the 2005-06 school year. Furthermore, I find that respondent was receptive to petitioners' requests and offered new ideas to increase the student's opportunities for interacting with her regular education peers. Accordingly, I find that the student's placement in the 2005-06 school year was not overly restrictive and that appropriate consideration was given regarding the quality of services that the student required (see 8 NYCRR 200.4[d][4][ii][c]). In summary, the June 2005 CSE developed an IEP that was reasonably calculated to provide the student with educational benefit and implemented it in the least restrictive environment.

With respect to the educational program recommended for the student for 2006-07 school year, I find that the 2006-07 IEP developed, and later amended, by the CSE reflected results of the most recent evaluations and was reasonably calculated to provide the student with educational benefit (Parent Exs. F; L). Responding to petitioners' opinion that the student should not be placed in the life skills program (Parent Ex. F at p. 6), the CSE coordinated the student's move to a less restrictive program, and recommended that five out of ten hours per week of home instruction through the summer would focus on the seventh grade math curriculum (*id.* at pp. 2, 6).⁴ The June 2006 CSE also recommended that the student's home instruction continue for ten hours through the first quarter of the 2006-07 school year to pre-teach skills and work to acclimate the student to the homework assignments and different challenges she would encounter (*id.* at pp. 2, 6). After the student's triennial evaluations were completed, program modifications and test accommodations were reviewed by the November 2006 CSE and the student's IEP was

⁴ The June 2006 IEP recommends 10 hours of home instruction during summer 2006 (Parent Ex. F at p. 2), however, only 5 of those hours is discussed in the minutes of the June 2006 CSE meeting (*id.* at p. 6).

appropriately amended to include use of graph paper and use of a calculator to check work in progress (Parent Ex. L at pp. 3, 6). The CSE determined that the goals remained appropriate with the addition of social goals that focused on the student continuing to develop independent skills (id. at p. 6).

Although the hearing record shows that the student struggled to recall information in her math class taught one month earlier (Tr. pp. 247-49), overall the student made progress. A report card containing the student's grades for the first two marking periods of the 2006-07 school year indicated that the student passed all of her academic classes during the first marking period, with grades ranging from 73 to 87 in her core academic courses and with grades of 100 in adapted physical education and chorus (Dist. Ex. 8 at p. 8). For the second marking period, the student's report card reflected that the student passed all of her courses, except for math, in which her grade declined from 87 to 60 (id.), which appears to be consistent with the student's noted struggles with recalling information.

An undated progress report on the student's 2006-07 annual goals and objectives through the second marking period indicated that the student was making "some progress" or progressing satisfactorily in her annual goals relating to study skills (Tr. p. 739; Dist. Ex. 8 at pp. 15-16). The student was satisfactorily progressing in her reading goals (Dist. Ex. 8 at p. 16). Regarding the areas of reading and writing, the student required "intensive assistance" in using contextual clues to determine meaning of vocabulary words, and "moderate assistance" in submitting a paragraph consisting of complete sentences on a topic requested by the teacher, but was progressing satisfactorily in the use of periods, question marks and exclamation points (id. at pp. 16-17). Two math goals involving word problems, fractions and mixed numbers were discontinued in the first marking period, while the student achieved the goal specific to the use of concrete materials and visual models relating to decimals and money (id. at p. 17). The student was progressing satisfactorily in her speech-language goals (id. at pp. 17-18), and made some progress in the social/emotional/behavioral area; although it was noted that she still needed assistance in transitioning (id. at p. 18). Regarding the annual goals specific to the motor area, the student was either making some progress or progressing satisfactorily (id. at pp. 18-19).

In consideration of the foregoing evidence of the student's cognitive delays, her needs as identified in her 2006-07 IEPs, respondent's implementation of the 2006-07 IEPs, the student's documented educational progress and the candor of the student's mother in acknowledging her increasing satisfaction by the second half of 2006-07 (Tr. p. 776), I conclude that petitioners have not established that respondent failed to offer the student a FAPE for 2006-07 school year.

Petitioners also contend that the student's progress in math was negatively affected in part because she was not provided access to a calculator, although it is unclear as to which school year they refer. Neither the June 2005 nor June 2006 IEPs included the use of a calculator (Parent Exs. E; F). Furthermore, the June 2006 CSE recommended ESY services from July 3, 2006 to August 11, 2006 that addressed the sixth grade goals, objectives and curriculum (Tr. p. 626). Moreover, the student's mother testified that during the ESY program for summer 2006, the student successfully used a calculator for math (Tr. pp. 668-69). The hearing record is unclear with regard to the extent of the student's opportunities to use a calculator between the time the student's IEP was revised in November 2006 and the time that a new teacher taught the student's class in January 2007 (Tr. pp. 239-240; Parent Ex. L). Although I will caution

respondent to ensure that the student is provided with the use of a calculator in accordance with her most recent IEP, under the circumstances presented here, I find that the harm alleged by petitioners was not persuasively established in the hearing record in a way that rises to the level of a denial of a FAPE.

In light of the determinations above, it is not necessary to address the parties' contentions with respect to petitioners' claim for compensatory education. Even if I were to address this issue on the merits, I note that compensatory education would not be an appropriate remedy here because the student was 14 years old at the time of the impartial hearing and any alleged deprivation of instruction can be remedied through the provision of additional services before the student becomes ineligible for instruction (Application of the Bd. of Educ., Appeal No. 07-031; Application of a Child with a Disability, Appeal No. 04-054; Application of the Bd. of Educ., Appeal No. 04-016; Application of the Bd. of Educ., Appeal No. 03-075; Application of a Child with a Disability, Appeal No. 01-094).

I have examined petitioners' remaining contentions, including their arguments that the impartial hearing officer improperly adopted the rationale offered by respondent in its memorandum of law,⁵ and find that they are without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 28, 2007**

**PAUL F. KELLY
STATE REVIEW OFFICER**

⁵ I note that, overall, the hearing record indicates that the impartial hearing officer carefully considered petitioners' claims as he listened to the evidence and asked cogent clarifying questions during the impartial hearing (Tr. pp. 142-45, 181-82, 259-61, 621, 650, 776-77). He also provided appropriate procedural assistance to petitioners who appeared pro se (see, e.g., Tr. pp. 8, 25, 63, 75, 130, 192-93, 322), and where appropriate, he ruled in petitioners' favor on more than one occasion (Tr. pp. 47, 454, 462).